IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 988.

OCTOBER TERM, 1923.

NORTHERN PACIFIC RAILWAY COMPANY, *et al.*, *Plaintiffs in Error,*

v.

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, *et al.*, *Defendants in Error.*

MOTION TO DISMISS

NOTICE, STATEMENT, ARGUMENT.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
STEPHEN V. CAREY,
Attorneys for Defendants in Error.

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NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, NORTH PACIFIC COAST FREIGHT BUREAU, and S. J. HENRY, as Agent of said North Pacific Coast Freight Bureau,
Plaintiffs in Error,
v.
THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, E. V. KUYKENDALL, Director, *et al.*,
Defendants in Error.

NOTICE.

To NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error, and to L. B. DA PONTE, its Attorney; to GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error, and to F. G. DORETY and THOMAS BALMER, its Attorneys; to CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, and to F. M. DUDLEY, its Attorney; to OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, Plaintiff in Error, and to W. A. ROBBINS, its Attorney; to NORTH PACIFIC COAST FREIGHT BUREAU and S. J. HENRY,

as Agent thereof, Plaintiffs in Error, and to THOMAS BALMER and L. B. DA PONTE, their Attorneys:

You will please be advised that on Monday, October 13, 1924, the defendants in error will submit to the consideration of the court, their motion to dismiss, a copy of which is attached.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
STEPHEN V. CAREY,
Attorneys for Defendants in Error.

Dated: May 27, 1924.

IN THE SUPREME COURT OF THE UNITED STATES

No. 988.

OCTOBER TERM, 1923.

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, NORTH PACIFIC COAST FREIGHT BUREAU, and S. J. HENRY, as Agent of said North Pacific Coast Freight Bureau,

Plaintiffs in Error,

v.

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, E. V. KUYKENDALL, Director of Public Works, HANCE H. CLELAND, Supervisor of Public Utilities, and FRANK R. SPINNING, Supervisor of Transportation, Members of said Department of Public Works,

Defendants in Error.

MOTION TO DISMISS.

Come now the defendants in error and move the court to dismiss the writ of error herein upon the following grounds:

I.

That the judgment of the Supreme Court of the State of Washington affirming the judgment of the Superior Court of Thurston County, State of Washington, if reviewable at all in this court, can, under Section 237 of the

Judicial Code as amended be reviewed only by certiorari and not by writ of error.

II.

That this court has no jurisdiction to review said judgment of the Supreme Court of the State of Washington for the reason that no Federal question is involved.

III.

That if a Federal question appears to be involved, the same is colorable only and not real and substantial.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
STEPHEN V. CAREY,
Attorneys for Defendants in Error.

STATEMENT.

This is a writ of error to the Supreme Court of the State of Washington, involving the affirmance by that court (125 Wash. 584) of the Findings of Fact and Order of the defendants in error under date February 1, 1922 (Appendix 1 hereto), in their proceeding entitled Department of Public Works of Washington, Complainant, v. Northern Pacific Railway Company, *et al.*, Respondents, No. 5159, and the related proceeding between the same parties No. 5330. These proceedings concerned the rates, rules, regulations and charges applicable to the intrastate movement of logs by railroad within the state of Washington. The complaint of defendants in error, after the usual descriptive and jurisdictional recitals, and a specific reference to all the tariffs involved, contains the following:

"That all of the tariffs referred to in the preceding paragraph contain rates and charges, rules and regulations for the transportation of logs within the State of Washington, which rates and charges, rules and regulations are excessive, unreasonable, discriminatory and preferential. That the Commission, in its findings in Cause No. 5092, dated at its office in Olympia, Washington, August 17, 1920, specifically called the attention of the above named carriers to the discriminatory character of the rates and charges set out in the various tariffs covering the movement of logs within the State of Washington, and in said Cause No. 5092 requested that carriers within a reasonable time file new tariffs in lieu of the ones then

in effect, and referred to above by number of previous issues thereof, containing new rates and charges that would be reasonable and non-discriminatory. That a reasonable time has elapsed, and each and all of said carriers above referred to have failed to file such tariffs."

The carriers joined issue upon these allegations by general denials of the same. Upon hearing, however, the carriers abandoned this position. Their witnesses admitted the existing inequities and offered an historical explanation of the same. The exhibit showing these inequities (Department's Ex. A) was referred to and accepted by the parties as a true compilation by tables and graphs of the existing log rates.

The Oregon-Washington Railroad & Navigation Company alleged in its answer that the existing "rates, charges, rules and regulations are fair, just and reasonable." The answer of the Great Northern Railway Company was to the same effect. These carriers subsequently joined with the other plaintiffs in error, urging that their Tariff No. 29, providing a substantial increase in rates, be made effective.

The proceeding before the defendants in error resolved itself into one where the effort was to discover a reasonable, non-discriminatory tariff. The defendants in error first called upon the railroads themselves to voluntarily correct these admittedly unlawful rates, and acted only after the railroads had neglected to take any steps whatever in that direction. The course of this matter is more fully indicated by the portion of the Findings and Order

under the caption "History," and Finding II (Appendix 1); as to these, no error has been assigned at any time.

This proceeding originated before the Public Service Commission of Washington, but was concluded before the Department of Public Works of Washington, which succeeded by operation of state law to all the powers and duties of the Commission.

ARGUMENT.

I.

The judgment attacked herein, if reviewable at all in this court, can, under Section 237 of the Judicial Code as amended, be reviewed only by certiorari and not by writ of error.

(*a*) It is manifest from an examination of the assignments of error (Appendix 2 hereto) that any Federal right claimed by the plaintiffs in error must be claimed, if at all, under the due process clause of the United States Constitution. A judgment violating such a right comes within the third class of cases enumerated in Section 237 Judicial Code as amended, the class which must be reviewed, if at all, by certiorari or by some method other than by a writ of error.

Sayward v. Denny, 158 U. S. 180;

Oxley Stave Co. v. Butler County, 166 U. S. 648.

The rule is well stated by Bunn in his work on "United States Courts," second edition, page 20, as follows: "The line between cases reviewable by writ of error and those not so reviewable is difficult to lay down exactly, and apparently will have to be marked out by decisions of the court. It is clear that cases not really involving the *validity* of some law or authority, but involving the contention only that some action taken under the supposed authority of law has

the effect to take property without due process, are not reviewable by writ of error (citing cases)."

(*b*) The judgment sought to be reviewed involves the rate-making order of a state administrative tribunal, affirmed by the Superior and Supreme Courts of that state. The administrative body derives its powers and duties from the Public Service Commission Law of Washington (Remington's Compiled Statutes of Washington, 1922, Sec. 10, 339 *et seq.*). This is a complete act upon the subject. It provides that all charges made by any common carrier shall be just, fair, reasonable and sufficient (Sec. 10,345), that is not too high to the prejudice of the shippers and not too low to the prejudice of the carrier. The tribunal created by the act is given power to correct abuses, but this power is to be exercised only when its jurisdiction is invoked by a written complaint and after notice and hearing (Secs. 10,389 and 10,422). The carrier against whom complaint is made is guaranteed a full and complete hearing and a compulsory process for the attendance of witnesses. At the conclusion of the hearing, the regulatory body is required to make findings of fact and a written order which must be served on the carrier before it becomes subject to any penalties (Sec. 10,423). If the carrier is dissatisfied with the order provision is made for a complete judicial review in the Superior Court. This review is had upon the evidence and exhibits introduced before the regulatory body and certified by it to the Superior Court—

a court of general jurisdiction in the State of Washington (Sec. 10,428). If the carrier can make a sufficient showing, it is entitled to have the order superseded pending the review proceeding in the Superior Court (Sec. 10,429). If the decision of the Superior Court is adverse, the carrier may appeal to the Supreme Court of the state and likewise in that court have a complete judicial review, and pending the determination of such appeal, it may have the order suspended if a proper showing be made (Sec. 10,430).

Since the decision of "Railroad Commission Cases," 116 U. S. 307, it has not been open to question that the several states have the right to regulate the intrastate rates of common carriers and may do so through an administrative department or commission, provided the scheme of regulation accords to carriers a full and fair opportunity to be heard before the administrative body and does not deprive them of their right to a judicial determination of judicial questions. The plan of regulation prescribed by the Washington statute, namely, a full hearing before the administrative body on complaint and after notice, with a judicial review in the Superior Court and on appeal in the Supreme Court on the record made before the administrative body, was expressly approved by the Supreme Court of the United States in *State ex rel. O. R. & N. Co. v. Fairchild et al.*, 224 U. S. 510. From the foregoing, it is clear beyond any question that this writ of error does not challenge the validity of state law nor the authority

which the state legislature by passing the law conferred upon the defendants in error. Examination of the assignments of error (Appendix 2) will demonstrate that the *validity* of state law and of the *authority* of the defendants in error to proceed under that law is conceded by not being questioned. The plaintiffs in error contend only that the administrative body in the exercise of an unquestioned authority under a valid statute committed error to the prejudice of plaintiffs in error. The case was resolved before the administrative body and upon review in the Superior and Supreme Courts of the state upon the view taken of the facts involved. Such a case does not draw in question the validity of a state statute or authority.

Section 237, Judicial Code, as amended;

Phila. and Reading Coal and Iron Co. v. Gilbert, 245 U. S. 162, 164;

Ireland v. Woods, 246 U. S. 323, 327;

Stadelman v. Miner, 246 U. S. 544, 546;

Dana v. Dana, 250 U. S. 220, 222;

Jett Bros. Distilling Company v. City of Carrollton, 252 U. S. 1, 5.

(c) The judgment sought to be reviewed does not draw in question the validity of a treaty or statute of, or an authority exercised under the United States. The judgment attacked, if it involves Federal law at all, does so by reason of a claim of construction at variance with that adopted by the state

courts and administrative body. The *validity* of Federal law has never been questioned in the case.

Erie Railroad Company v. Hamilton, 248 U. S. 369;

New Orleans Land Company v. Brott, Supreme Court Reporter Advance Sheets, Vol. 44, No. 3, p. 29 (Decided November 12, 1923).

(*d*) Adopting for sake of argument only the terms of petition of plaintiffs in error praying issuance of the writ, it is alleged "that in the record and proceedings in said cause it will appear that there was drawn in question the validity of an authority exercised under the State of Washington and the laws thereof on the ground of repugnance to the constitution and laws of the United States, and that the decision was in favor of the validity of said authority." The claim of the petition is based on a clear misconception of the meaning of the word "authority" as used in the provisions of Sec. 237, of the Judicial Code as amended by Act of Congress, approved September 6, 1916 (39 Stat. 726). The language of *Ireland v. Woods, supra,* at page 328, is as follows: "We said in *Champion Lumber Company v. Fisher,* 227 U. S. 445, 451, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject

of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See, also, *Foreman v. Meyer*, Id. 452. If there be no dispute about the facts, *Hyatt v. Corkran*, 188 U. S. 691, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a State." The existence or constitutionality or legality of the laws of the State of Washington or the authority of the defendants in error have never been challenged in these proceedings. The only claim made at any time herein is a dispute as to the exercise of unquestioned authority, and the discharge of powers and duties under a state statute whose validity is not attacked.

II.

This court is without jurisdiction to review the judgment of the Supreme Court of the State of Washington attacked herein for the reason that no Federal question is involved.

It is apparent from a perusal of the several assignments of error that the plaintiffs in error are seeking to have the Supreme Court of the United States review disputed questions of fact which have been decided adversely to them first by the state regulatory body, and later by the Superior and Supreme Courts of the state. The general rule is that the

Supreme Court of the United States will not examine disputed questions of fact on writ of error.

Dower v. Richards, 151 U. S. 658;
Egan v. Hart, 165 U. S. 188;
Minneapolis etc. R. R. Co. v. Minnesota, 193 U. S. 53, 64;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 107.

Assignments of error numbers I and II allege the regulatory body applied an erroneous rule respecting burden of proof. These assignments cannot possibly raise any Federal question where, as in this proceeding, notwithstanding the adverse ruling of the regulatory body with respect to the burden of proof, all parties went forward and submitted complete proof on both sides of the question and no evidence of plaintiffs in error was excluded. At the conclusion of the proceeding, the regulatory body decided the matter not by reference to any rule of burden of proof but upon a consideration of all the evidence. Moreover, the Superior Court and the Supreme Court affirmed the order after a full consideration of all the evidence, so that at the present stage of the case the initial question as to who had the burden of proof in the first instance is entirely moot. In reality, the record suggests only a question relative to the "order of proof" rather than "burden of proof." This cannot possibly constitute a Federal question in the absence of a claim that the carriers were prohibited from introducing material evidence

and having the same fairly considered by the regulatory body and by the two state courts. Properly considered, the contention raises only a question of state law, the decision of which by the state courts is controlling.

Castillo v. McConnico, 168 U. S. 674, 683;
Gasquet v. Lapeyre, 242 U. S. 367, 369;
Enterprise Irrigation Dist. v. Farmers Mutual Canal Company, 243 U. S. 157, 166.

The claim in the second assignment that the alleged error in procedure prefers intrastate commerce and prejudices interstate commerce is frivolous on its face. If the objection were well taken, it could only afford basis for certiorari and not writ of error.

Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 259.

The assignments attempt to raise a Federal question based on the Transportation Act. Under the terms of the Transportation Act itself and under the decision of the Supreme Court of the United States in *Illinois Central Railroad Company v. Public Utilities Commission,* 245 U. S. 493, 505, the authority to determine whether or not the action of a state regulatory body burdens interstate commerce is committed to the Interstate Commerce Commission. No court, and certainly no Federal court, has any power to consider such a question in the absence of a finding of fact by the Interstate Commerce Commission. The power of the Interstate Commerce Commission has not been invoked.

The contention based on the treatment of the Federal income tax (Assignment VI) is without merit. At the time defendants in error issued their order herein, there had been no decision of this matter in the highest court, but the United States District Court for the Northern District of Georgia had handed down a decision in the case of *Georgia Railway and Power Company v. Railroad Commission of Georgia,* 278 Fed. 242, in which it was held the income tax was not an allowable operating expense. Later, the Supreme Court of the United States held in *Galveston Electric Supply Company v. City of Galveston,* 258 U. S. 388, and *Georgia Railway and Power Company v. Railroad Commission of Georgia,* 262 U. S. 625, that the Federal income tax is properly deductible as an operating expense. The Interstate Commerce Commission in its rate reduction order of May 16, 1922 (Reduced Rates 1922—68 I. C. C. 676), in which it determined five and three-fourths per cent of the aggregate value of the railway property of carriers as constituting a fair return thereon on and after March 1, 1922 (superseding an existing six per cent fair return—Ex Parte 74, 58 I. C. C. 220), found as follows (p. 683):

"We may observe that a fair return of 5.75 per cent, representing an aggregate annual net railway operating income arrived at after deducting, among other things, the Federal income tax on a return of 6 per cent, would be approximately the equivalent of a fair return of 6 per cent, out of which the Federal

income tax was payable." The defendants in error sought in their order to preserve a return of 6 per cent to the carriers (Finding XX—Appendix 1), and therefore the change in accounting practice established by the decision of the Supreme Court at best results only in harmless error.

Assignment of error No. XII, accepting the misstatement of the facts for the sake of argument only, raises no Federal question. The practice of testing rates by experience is one which has repeatedly received the sanction of the courts.

Brush Electric Co. v. Galveston, Supreme Court Reporter Advance Sheets, Vol. 43, No. 17, p. 606 (Decided June 4, 1923);

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 54.

Louisville v. Cumberland T. & T. Co., 225 U. S. 430, 436;

Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 173;

Tilley v. Savannah etc. R. Co., 5 Fed. 641, 663;

St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220, 225;

Central of Georgia Railway Co. v. McLenden, 155 Fed. 974, 976;

Railroad Commission v. Central of Georgia Ry. Co., 170 Fed. 225, 234;

Landon v. Public Utilities Commission, 234 Fed. 152, 157.

Assignment of error No. XIII, based also on an erroneous statement of the facts or an incorrect conclusion drawn therefrom, is not available to plaintiffs in error. It was established from the testimony of

plaintiffs in error, without more, that a uniform scale of rates was the only workable and reasonable schedule possible, plaintiffs in error proposed such a uniform scale (Tariff No. 29) for adoption themselves, and they cannot now be heard to attack uniform rates for all.

McDonald v. Ore. R. R. & Nav. Co., 233 U. S. 665, 670.

Conceding for argument only that it is possible for the plaintiff in error, Oregon-Washington Railroad & Navigation Company, to move log traffic on higher rates than those charged by its competitors herein, it apparently had no such theory of the case at its inception, for as pointed out in our "Statement" *supra,* the Oregon-Washington in answering the complaint before defendants in error took a position with the Great Northern that the existing rates were reasonable.

III.

The assignments of error attempt to raise questions of confiscation under the Fourteenth Amendment. These assignments all involve the claim that the regulatory body fell into error in apportioning costs and values. Taken at full worth, they present only conflicting conclusions drawn from disputed evidence. In the end, defendants in error found that due to the past practices of the carriers in maintaining admittedly unlawful and discriminatory rates for thirty years or more, it was impossible to prescribe with absolute certainty a scale of rates just to

both the railroads and the public until the results of the rate ordered had been observed. In doing this, defendants in error adopted the practice sanctioned by the Supreme Court itself *(Wilcox v. Consolidated Gas Co. etc., supra)*. It cannot be contended that the conclusion reached by the defendants in error and approved by the two state courts is wholly without foundation in reason. Therefore, the Federal question attempted to be asserted under the Fourteenth Amendment is colorable only and not real and substantial.

New Orleans Water Works v. Louisiana, 185 U. S. 336;
Equitable Assurance Society v. Brown, 187 U. S. 308, 314;
Deming v. Carlisle Packing Co., 226 U. S. 102;
Consolidated Turnpike Co. v. Norfolk etc. Ry. Co., 228 U. S. 596, 600;
Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 137;
Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 24.

It is submitted therefore that the decision of the state court in the instant case cannot be reviewed by this court upon writ of error and that in any event no Federal question is involved. If an order of this kind under the circumstances of this case can be reviewed by writ of error, the decision will mean that every rate order of every state regulatory body even though approved by the highest court in the state must also be reviewed on the demand of the carrier

by the Supreme Court of the United States, if the carrier sees fit to allege in form a violation of the Fourteenth Amendment. The motion to dismiss should be granted.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
STEPHEN V. CAREY,
Attorneys for Defendants in Error.

APPENDIX 1.

Before the Department of Public Works of Washington

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, *Complainant,*

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, NORTH PACIFIC COAST FREIGHT BUREAU, S. J. HENRY, Agent, *Respondents.*

No. 5159 and No. 5330 CONSOLIDATED

FINDINGS OF FACTS AND ORDER.

This matter came on regularly for hearing, pursuant to notice duly given, in the Senate Chamber at Olympia, Washington, on April 11th to 13th, 1921; then being continued at Olympia, on June 27th to 28th, inclusive, and further continued at Olympia, October 24th to 29th, inclusive, before E. V. Kuykendall, Director, and Supervisors Hance H. Cleland and Frank R. Spinning; the Department being represented by O. O. Calderhead, Traffic Expert; R. W. Clifford, Assistant Attorney General; A. E. Freeman and H. O. Berger, Assistant Traffic Experts; E. J. Delbridge and H. S. Taylor reporting the proceedings.

The parties were represented as follows:

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY:

By James L. Brown, Asst. Supt. of Trans., Seattle, Wash.
By F. C. Dow, Supt., Tacoma, Wash.
By F. M. Dudley, Attorney, Seattle, Wash.
By H. B. Earling, Vice-President, Seattle, Wash.
By Jas. S. Eccles, Trainmaster, Tacoma, Wash.
By E. A. Laik, D. F. & P. A., Tacoma, Wash.
By A. W. Faragher, Chief Clerk of Vice-Pres., Seattle.
By Samuel Greengard, Traveling Accountant, Seattle.
By O. P. Kellogg, Asst. to Asst. Trf. Mgr., Seattle.
By M. Nicholson, General Mgr., Seattle, Wash.
By Chas. E. Ingalls, Accountant, Seattle, Wash.

GREAT NORTHERN RAILWAY COMPANY:

By Thomas Balmer, Attorney, Seattle, Wash.
By C. N. Bolander, Chief Clerk, Seattle, Wash.
By H. McCaustland, Car Foreman, Everett, Wash.
By C. McDonough, Supt. Cascade Div., Everett, Wash.
By Henry H. May, Chief Clerk Acct. Dept., St. Paul.

NORTHERN PACIFIC RAILWAY COMPANY:

By W. C. Albee, Supt., Tacoma, Wash.
By L. R. Capron, Asst. G. F. A., Seattle, Wash.
By F. A. Cleveland, Special Clerk, Seattle, Wash.
By E. V. Peterson, Asst. Statistician, St. Paul.
By Jas. Bruce, Master Mechanic, Tacoma, Wash.
By L. B. da Ponte, its attorney.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY:

By J. C. M. Dodds, Aud'r of Disbursements, Portland, Ore.
By W. H. Guild, Asst. Supt., Portland, Oregon.
By J. W. Mount, Asst G. F. A., Portland, Ore.
By W. A. Robbins, Attorney, Portland, Oregon.

COWLITZ, CHEHALIS & CASCADE RAILWAY COMPANY:

By W. E. Brown, Vice-President and General Manager.
By O. L. Brown, President, Chehalis, Wash.

SPOKANE INTERNATIONAL RAILWAY COMPANY:

By Geo. B. King, A. G. F. & P. A., Spokane, Wash.

NEWAUKUM VALLEY RAILROAD COMPANY:

By F. C. Frew, G. F. A., Onalaska, Wash.

PUGET SOUND & CASCADE RAILWAY COMPANY:

By Thomas Smith, its attorney, Mount Vernon, Wash.

SKOOKUM RAILWAY & LOGGING COMPANY:

By F. H. MacLaffeith, Gen. Mgr., Tenino, Wash.
By A. F. Cook, Tenino, Wash.

SULTAN RAILWAY & TIMBER COMPANY:

By Joseph Irving, Pres. and Mgr., Everett, Wash.

SUNSET TIMBER COMPANY, LEWIS MILLS & TIMBER COMPANY, RAYMOND LUMBER COMPANY, WARREN LOGGING COMPANY, TRAP CREEK LOGGING COMPANY, GLOBE LUMBER COMPANY, and WILLAPA HARBOR TRAFFIC ASSOCIATION:

By Welsh & Welsh, Attorneys.
By E. C. Richmond, Secy. Willapa Harbor Traffic Assn.

ASSOCIATED LOG SHIPPERS:

By Henry L. Gray, Engineer, Seattle, Wash.
By Lyle, Henderson & Carnahan, Attorneys, Tacoma, Wash.

EASTERN RAILWAY & LUMBER COMPANY:

By S. A. Agnew, Manager, Centralia, Wash.
By Reid F. Hubbard, Secy., Centralia, Wash.

CASCADE LUMBER COMPANY:

By A. H. Huebner, General Manager, Yakima, Wash.
By A. E. Slaughter, President, Yakima, Wash.

MASON COUNTY LOGGING CO., INDEPENDENCE LOGGING CO. and VANCE LUMBER COMPANY:

By W. H. Abel, Attorney, Montesano, Wash.
By J. A. Vance, Vance Lumber Co.
By H. Synnestvedt, Pres. and Mgr., Independence Logging Co.
By J. T. Krumm, Vice-Pres. and Supt.
By C. R. Bordeaux, Asst. Mgr. Mason County Logging Co.
By Thomas Bordeaux, President, Mason County Logging Co.
By Wilford Bordeaux, Mason County Logging Co.

SKAGIT LOGGING & BOOM COMPANY:

By L. Houghton, President, Seattle, Wash.
By Ed. R. Hogg, Secretary, Seattle, Wash.

BUFFELIN LUMBER MFG. COMPANY:

By H. E. Rogers, Auditor, Tacoma, Wash.

WILLAMETTE VALLEY LUMBERMEN'S ASSOCIATION:

By F. G. Donaldson, Traffic Mgr., Portland, Oregon.

MINERAL LAKE LOGGING COMPANY, CASCADE TIMBER COMPANY and PACIFIC STATES LUMBER COMPANY:

By E. M. Hayden, Attorney, Tacoma, Wash.
By J. S. Dickson, Manager, Tacoma, Wash.

LAKE RILEY LUMBER COMPANY:

By Petrus Pearson, President, Seattle, Wash.

LOGGERS' INFORMATION ASSOCIATION and CHINN TIMBER COMPANY:

By R. B. Chinn, Vice-President and Manager.

GREAT NORTHERN LUMBER COMPANY:

By B. K. Brouwer, Chief Clerk, Leavenworth, Wash.

WESTERN PINE MANUFACTURERS' ASSOCIATION:

By R. J. Knott, Traffic Manager, Portland, Oregon.

THE MCNEILL-O'HEARNE COMPANY, SEDRO LOGGING COMPANY and NESTOS TIMBER COMPANY:

By Stephen V. Carey, Attorney.

PUGET SOUND SAW MILLS & SHINGLE COMPANY:

By Farrell, Kane & Stratton, and Stephen V. Carey, Attorneys, Seattle, Wash.

NORTH PACIFIC COAST FREIGHT BUREAU:

By S. J. Henry, Seattle, Wash.

CHERRY VALLEY LOGGING COMPANY:

By T. M. Williams, Everett, Wash.

SAGINAW TIMBER COMPANY:

By A. J. Morley, President, Aberdeen, Wash.

HOBI LOGGING COMPANY:
By A. J. Morley, Secretary, Aberdeen, Wash.

UNION LUMBER COMPANY:
By Judd Greenman, Logger, Union Mills, Wash.

C. K. SPAULDING LOGGING COMPANY:
By R. H. Mills, Secretary, Portland, Oregon.

CLEAR LAKE LUMBER COMPANY:
By B. R. Lewis, Clear Lake, Wash.

CLARKE COUNTY TIMBER COMPANY:
By H. C. Clair, Treasurer, Portland, Oregon.

MCCOY LOGGIE TIMBER COMPANY:
By P. McCoy, President, Bellingham, Wash.

DEER PARK LUMBER COMPANY:
By W. M. Leuthold, President, Deer Park, Wash.

WEST FORK LOGGING COMPANY:
By L. T. Murray, President, Tacoma, Wash.

WEST COAST LUMBERMEN'S ASSOCIATION:
By H. N. Proebstel, Traffic Manager, Seattle, Wash.

BALCH LOGGING COMPANY:
By H. P. Brown, Manager, Aberdeen, Wash.

PUGET SOUND LUMBER COMPANY:
By James Buchanan, President, Tacoma, Wash.

WALLACE FALLS TIMBER COMPANY:
By J. E. Frost, Vice-Pres. and Gen. Mgr., Gold Bar, Wash.

SOUND TIMBER COMPANY:
By J. L. Bridge, Manager, Seattle, Wash.

PACIFIC CAR & FOUNDRY COMPANY:
By F. W. Chriswall, Chief Engineer, Seattle, Wash.
By E. T. Fehnel, Asst. Sales Mgr., Seattle, Wash.

THE PUBLIC SERVICE COMMISSION OF OREGON:
By Hal. F. Wiggins, Traffic Expert, Salem, Oregon.

Witnesses were sworn and examined, documentary evidence was introduced, and after a consideration of all the facts, the Department makes and enters its findings of fact and order hereinafter set forth.

HISTORY.

This cause involves the rates, rules, regulations and charges applicable to the intrastate movement of logs within the State of Washington, and is brought about by complaint on its own behalf by the Public Service Commission of Washington, now the Depart-

ment of Public Works of Washington and hereinafter referred to as the Department.

Briefly reviewed the present log rates now under consideration originated through the establishment by the Northern Pacific Railway Company of logs rates for the use of tidewater lumber mills to whom had been sold large tracts of standing timber acquired by the Northern Pacific Railway Company in the Government land grant. The contract under which the timber was purchased provided that a heavy percentage of the manufactured product of logs should be moved over the line of the Northern Pacific Railway to transcontinental points, and a rate was named for the transportation of the logs from the point of logging operations to the lumber mill which was in the nature of a milling in transit rate. All subsequent log rates have been more or less governed by the established log rates published by the carriers in the early days for the purpose of securing the establishment of lumber mills at advantageous localities from an operating standpoint. The tariffs of the carriers, both past and present, confirm this belief in their definition of saw logs prescribed in their tariffs as follows:

"The term 'saw log' as used in this tariff, applies only to cedar, cottonwood, fir, hemlock, larch, pine, poplar or spruce logs manufactured at saw mills into lumber or shingles."

In no other tariffs except those providing for milling in transit privileges is an analagous definition of any commodity carried.

FINDINGS OF FACT.

I.

The records submitted in this case indicate that as a whole more manufactured lumber is being handled by the carriers than the carriers are transporting in the form of logs. It is true that some of this is accounted for by the fact that certain mills manufacture lumber without any corresponding log haul, but a great deal of it is due to the fact that logs are transported by water and manufactured into lumber which goes forward by rail.

II.

The rates on logs as covered by this cause were originally those named by the carriers themselves, and with a few exceptions the Public Service Commission of Washington has not considered any of the log rates named by the carriers in any case before it. There has never been a case involving all of the rates applicable to the movement of logs within the state before this Department. It is worthy of note that practically all log rates were voluntarily established and maintained for long periods by the carriers themselves without application to any regulatory body for any increase, prior to Federal control. While the carriers were under the control of

the United States Railroad Administration, all rates for the transportation of freight were increased 25 per cent effective June 25, 1918, under General Order No. 28 of the United States Railroad Administration, and on August 26, 1920, these rates were again increased 25 per cent by order of the Interstate Commerce Commission in Ex Parte 74 and of the Public Service Commission of Washington in Cause No. 5092.

III.

In cause No. 5092 involving the general increase in rates applicable to all railroads within the state parties to this case, the Public Service Commission called attention of said carriers to the discriminatory rates applicable on the intrastate movement of logs within the state, and directed the carriers to readjust said rates upon a proper basis. Pending this readjustment the Department permitted the 25 per cent increase to apply on logs as well as other intrastate freight for the sake of uniformity to meet the critical emergency then existing, and to carry out the purpose and intent of the 1920 transportation act and the order of the Interstate Commerce Commission. Our order permitting said increase contained the following:

"The authorization of said general increase is not and shall not be construed as a finding by the Commission that such increase is reasonable, or non-discriminatory, and in the event that any rate so increased is hereafter attacked on any ground, the burden of proof shall be upon the carrier affected to justify the rate challenged, in the same manner as if such carrier were making application for the increase."

On December 28, 1920, no action having been taken by the carriers to readjust said rates, the Public Service Commission filed its complaint, charging that said rates, rules, regulations and charges were unreasonable, unjust, discriminatory, prejudicial and preferential, and ordered that hearings be held to determine what rates should be prescribed for the intrastate movement of logs within the state.

During the course of the hearings in cause No. 5159 it was suggested by members of the Department that the carriers, parties thereto, present a proposed joint tariff which might be by the Department considered in connection with the determination of the questions therein involved namely, uniform carload log rates. No such tariff was filed in that proceeding, but near the conclusion of the final hearing it was stipulated by and between the logging interests, parties thereto, and the carriers, parties thereto, that the carriers should prepare and file with the Department a tariff carrying proposed uniform log rates.

It was also stipulated by and between the same parties that no hearing need be, or should be, had to determine the reasonableness or sufficiency of the rates to be covered in the proposed tariff, and that all of the evidence and exhibits in cause No. 5159 should be

considered all of the evidence which might be introduced in a hearing on said tariff, and that the final order fixing uniform log rates by this Department in cause No. 5159 should be the final order as to said tariff, and that for all purposes the two proceedings might be considered as one and consolidated. Through the North Pacific Coast Freight Bureau, by S. J. Henry, its agent, said tariff was filed, being given its local freight tariff No. 29, W. D. P. W. No. 65, issued November 16, 1921, received November 18, 1921, effective December 17, 1921, and was filed in compliance with that stipulation and agreement. The Department therefore in cause No. 5330 issued an order of suspension, suspending said tariff for a period of 90 days from December 17, 1921, and ordered that for all subsequent orders and for all other purposes, causes Nos. 5159 and 5330 be consolidated and treated as one, and that all of the evidence, exhibits and briefs offered and received, or filed by all parties in cause No. 5159 be considered as having been offered and received or filed in cause No. 5330, and that the rates then in effect at the time of the date of said order, November 26, 1921, on sawlogs in carloads, applying on intrastate traffic, be maintained and remain in full force and effect until further order of the Department. The Department by this order expressly reserved all right and jurisdiction to enter its order in cause No. 5159 with the same force and effect as though the said tariff No. 29 then under suspension had not been filed.

A hearing was held on December 20th, 1921, for the purpose of permitting parties not previously interested in cause No. 5159 to enter evidence and exhibits, and at that hearing it was stipulated by the parties entering appearance in same, that the evidence, exhibits and briefs of all parties in cause No. 5159 should be considered as their own.

IV.

The rates for the transportation of logs within the State of Washington now charged by the four principal carriers within the state, as well as the rates for the transportation of logs charged by such carriers prior to August 26, 1920, are and were those shown by Department's Exhibit A.

V.

It appears from the evidence in this case that the tariffs and schedules containing the rates shown in Department's Exhibit A are and were lacking in uniformity, and are and were grossly discriminatory, unduly preferential and therefore unlawful.

VI.

The log traffic within the State of Washington is for the most part confined to a limited area, or the district west of the Cascade Mountains. In the case of the carriers operating in this area, the log transportation characteristics are substantially the same. It was conceded by all parties to this case that a uniform distance tariff

covering the haul of logs within the State of Washington was desirable. The tariff proposed by the carriers, is a uniform distance tariff, applicable to all lines alike. It is the purpose of this order to establish a uniform distance scale.

VII.

All operating cost exhibits introduced covered the year 1920, during which year the peak prices for labor and material were reached. Since 1920, there has been a marked decline in labor and material costs. As near as can be determined, the unit cost of railroad operation at the present time is approximately 20 per cent less than the unit costs of a year ago.

VIII.

A considerable portion of the railway operating cost during 1920 was due to an abnormal empty car movement, occasioned by the efforts of the carriers to accomplish the return of their cars to their home lines after the relinquishment of unified Federal operation.

IX.

The operating revenues assigned to the State of Washington are made up of revenues from intrastate traffic, plus a part of the revenue from interstate traffic assigned to the State of Washington upon a straight mileage basis. However, the operating expense assigned to the State of Washington embraces all of the expense incurred within the state and includes all of the assembling and terminal expense on interstate freight. During the year 1920 the unit freight operating cost charged to the State of Washington by the four principal carriers was approximately 35 per cent in excess of the combined system average unit freight operating cost. According to the reports of these carriers, their combined systems earned a net profit in freight operation during the year 1920 of $12,943,697, whereas freight operations in the State of Washington are reported to have resulted in a loss of $6,934,966.

X.

The unit freight operating cost within the State of Washington would be no greater than the system unit freight operating cost if the assembling and terminal expense in connection with interstate shipments is apportioned over the entire length of haul. Whatever increased cost may result from the haul over the Cascade Mountains is offset by the favorable climatic conditions within the State of Washington, as compared with the rigorous winters in the neighboring states of Montana, the Dakotas and Minnesota, which hamper the movement of freight, with a corresponding increase in unit operating cost, and the Cascade Mountains are certainly no more formidable than the Rocky Mountains. If the unit freight operating cost incurred by the four principal carriers within the State of Washington is no greater than the system unit freight operating cost, then the freight traffic within the state during the year 1920, instead of producing a

loss of $6,934,966, actually yielded a profit of $6,694,432. Whatever the correct rule for the allocation of terminal and assembling expense in relation to interstate traffic may be, it is not properly chargeable to the log traffic of this state.

XI.

Even if the unit freight operating cost within the State of Washington should be excessive on account of the haul across the Cascade Mountains, it should be noted that logs are not so hauled. The log traffic is one in which empty cars are hauled up grade, the loads being hauled down grade. Logs generally are delivered in lots of from ten to thirty cars, and rarely ever in lots of less than five cars, thus constituting a very desirable form of traffic. Due to the short haul of logs and the facilities for rapidly loading and unloading, the carriers are able to keep their logging equipment more profitably employed than the equipment used in the handling of other commodities. Log cars are under load a greater portion of the time than are other classes of equipment having the same average length of haul, while the tonnage of the logs per car is greater than in the case of the average commodity handled. There is considerable reason for the conclusion that the cost of log transportation is less than the average unit cost of freight transportation within the state. The log traffic is to a very large extent confined to the district west of the Cascade Mountains where the greater portion of such traffic originates and is handled on branch lines. The log traffic makes little use of the extensive terminals within the state, the shippers in many instances providing their own terminal facilities. The rolling stock used in the handling of logs consists altogether of flat cars which are less costly than other types of equipment.

XII.

Various exhibits were introduced by the associated log shippers and by the carriers to show the financial results from log transportation within the state during the year 1920, the most important of these exhibits being Associated Log Shippers Revised Exhibit No. 4, and the Great Northern Railway Company's Exhibit No. 24. These exhibits were decidedly conflicting. Without attempting to pass upon the comparative merits of these exhibits, we find that Great Northern Exhibit No. 24 contains certain errors and improper assumptions, to-wit:

(a) In establishing the relation between the 1920 taxes and gross earnings, system non-operating revenues to the amount of $12,291,544 were omitted, the result being an unwarranted increase in the amount of taxes assigned to the log traffic.

(b) In listing the system taxes paid, income taxes to the amount of $3,508,928 were included, of which $643,101 were charged to the State of Washington.

(c) Owing to the fact that the log traffic is for the most part handled upon comparatively inexpensive branch lines; and to the fact that it makes practically no use of the costly terminals; and to the further fact that the rolling stock used in the handling of same has a comparatively low cost, it seems unfair to assess against the log traffic its exact prorata of taxes based on gross earnings. An assessment of approximately 50 per cent of its prorata of taxes on such basis should be sufficient

(d) The conclusions reached in Great Northern Exhibit No. 24 are to a certain extent based upon figures supplied by the carriers and shown in Associated Log Shippers' Exhibit No. 3, which figures were challenged by the Associated Log Shippers as being of doubtful correctness, and upon which point the carriers produced no additional evidence or information.

(e) Said Great Northern Exhibit No. 24 shows that during the year 1920 the log traffic within the state was handled by the four principal carriers at a loss of $110,629, while their intrastate traffic within the state earned a net profit of $3,284,579. Therefore, if carried to its logical conclusion, this exhibit shows that during the same year the interstate traffic handled within the state, must have incurred a loss of $17,241,385. This conclusion seems absurd when considered in the light of the testimony of the carriers that long haul traffic is more profitable than short haul traffic.

(f) The exhibit shows that during the year 1920 the four principal carriers within the state incurred a loss from log traffic of $110,629. According to our computation such log traffic during the year in question yielded a profit over the cost of operation, taxes and depreciation accounts, of at least $818,448.

XIII.

In arriving at the net revenue from log traffic earned by the four principal carriers within the state during 1920, of $818,448, the following method was used:

Gross revenue from log transportation	$2,859,172	
Incidental freight revenue assigned to log transportation	56,232	
Total revenue		$2,915,404
Operating expense assigned to log transportation	$1,923,198	
Taxes assigned to log transportation	173,758	
Total expense		2,096,956
Total net		$ 818,448

In arriving at the operating expense assigned to the log traffic, the cost of freight operation within the State of Washington was calculated upon the basis of the cost per 1,000 gross ton miles of handling all freight upon the combined systems of the four principal carriers, and in this manner the total cost of freight operation as-

signable to the State of Washington was found to be $38,678,870, which is equivalent to a unit operating cost of $5,321 per 1,000 revenue gross ton miles handled by the four principal carriers within the state during the year in question. On this basis the cost of handling the log traffic within the state during the year by such carriers was $1,923,198. The taxes assigned to the log traffic are one-half of those contended for by the carriers after the elimination of income taxes. All of the figures used in this calculation are contained in the annual reports filed with us by the carriers, or were taken from the exhibits supplied by the carriers in this case.

XIV.

The present main track mileage of the four principal carriers within the State of Washington is 4,936 miles. The actual value of all the property owned within the state by such carriers, as shown by Great Northern Exhibit No. 25 (same being the minutes of the 1921 proceedings of the State Equalization Committee), is $294,360,243, of which $255,672,247 represents real property, while $38,687,996 represents rolling stock. The cost of the aforementioned property is unknown, valuation now in progress by the Interstate Commerce Commission being incomplete, but the Washington Railroad Commission found that the actual cost of 3,007 miles of main track within the state was approximately $50,000 per mile, which cost included terminals, rolling stock and all operating property of every kind. Upon the basis of a cost of $50,000 per mile, the property of the four principal carriers within the state would have a total cost of $246,800,000.

XV.

For the purpose of estimating the approximate rate of return earned by the four principal carriers within the state from the log traffic during the year 1920, we will assume the value of the property of such carriers within the state which is in any way used or useful in connection with the log traffic, is $300,000,000, a greater sum perhaps than the evidence will justify. Following the method of division as indicated by the carriers' exhibits, it is considered that not more than 75 per cent of such value, or $225,000,000 is assignable to the freight business within the state. During the year 1920 the gross ton miles of logs, hauled by the four principal carriers within the state, constituted 4.97 per cent of the total gross ton miles of revenue freight hauled within the state by such carriers. It is therefore considered that five per cent of that part of the value of the carriers' property assigned to freight service should represent the tentative rate base for use in determining the rate of return earned by the log traffic in 1920; this tentative rate base being $11,250,000.

XVI.

Using the tentative rate base of $11,250,000 and the net revenue over operation, taxes and depreciation accounts, or $818,448, it is seen that during the year 1920 which was a period of excessively high operating cost, the log traffic within the state earned a net rate of return of 7.28 per cent which is in excess of the 6 per cent rate of return prescribed by the Interstate Commerce Commission under the Transportation Act of 1920 as a fair rate of return on the aggregate value of the property of the railroads as a whole, and a rate which the carriers have treated in this case as not unfair.

XVII.

There is no commodity movement in the United States which is similar or analogous to the movement of logs in the Pacific Northwest. The log traffic in this state is large in volume and it is practically a continuous movement in trainload lots throughout the year. The lumber industry which utilizes logs as raw material, supplies the carriers with approximately 65 per cent of the outgoing traffic from this state. Due to the peculiar local conditions which surround the log traffic within this state, comparisons of log transportation rates in other states and decisions of tribunals involving log rates in such states are of little aid to us in this case. Neither is the log traffic fairly comparable with that of any other commodity transported within the State of Washington.

XVIII.

That a fair, reasonable and uniform tariff to cover the transportation of logs within the State of Washington upon the lines of all carriers parties to this proceeding, is that shown in the order attached hereto. This tariff in our judgment will provide adequate compensation to the carriers and the rates specified therein are no greater than shippers should be called upon to pay. The rates which are now, and which have been, in effect were and are unduly discriminatory, preferential and lacking in uniformity. The revenue from such a schedule is no criterion as to the revenue which might result from a uniform and nondiscriminatory tariff. The rates prescribed herein, are just, fair, reasonable and sufficient.

XIX.

In order to test the workings of this tariff, it is provided that the same shall remain in effect during an experimental period of twelve months from the date it becomes effective, and if at the end of such experimental period the tariff contained in the attached order is found to be oppressive to the carriers or to the log shippers, a rehearing may be had before this Department upon the matters involved in this order.

XX.

The impossibility of accurately determining the cost of transporting any given commodity by a rail carrier is conceded by many traffic and statistical experts. A comparison of the widely different conclusions reached by experts of acknowledged ability and integrity who have presented exhibits in this case, demonstrates the difficulties of such a task. We realize that the calculations we have made and the conclusions we have reached differ from those of the experts on both sides of this controversy. We and our own experts, however, have had the benefit of all the exhibits and testimony in the case, and have sought to avoid errors pointed out during the progress of the hearing. While the difficulty of ascertaining with certainty the cost of transporting any given commodity in a past operation is great, the difficulty of forecasting the cost is infinitely greater. Predictions can only be based upon past experiences and future probabilities in the light of all the facts. The volume of traffic moving is a controlling element. The fixed charges of a railroad remain fairly constant, and the operating expenses do not increase proportionately with increased traffic volume.

If the rates we prescribe stimulate the log movement or the volume of traffic increases for any other reason, these rates will increase the earnings of the carriers on this commodity.

It is because of the impossibility of forecasting results with certainty that we have decided to prescribe a twelve months period of experimental operation under the new tariff.

The rates we have fixed will constitute a material reduction to the shippers, and in view of less expensive operation, and the reasonable assumption of increased volume of traffic, we believe they will yield a net revenue equal to that afforded by the existing rates, and in any event equal to the rate of return fixed by the Interstate Commerce Commission as fair and just on the traffic as a whole.

XXI.

The Department finds that Northern Pacific Coast Freight Bureau local freight tariff No. 29, W. D. P. W. No. 65, referred to in finding III is unjust, unreasonable and more than sufficient and more than the traffic will bear, and will order that this tariff be cancelled and superseded by another tariff which shall carry the rates and provisions named in the order attached hereto.

XXII.

The Department will prescribe in its order rates for the intrastate movement of logs within the State of Washington on a single car basis without prescribing a different train load rate. The rates to be named in the order are based upon both the single car and the trainload movement, and the Department has taken into consid-

eration the fact that the movement is peculiarly in trainload lots of ten or more cars because of the methods of logging operations.

XXIII.

In view of the fact that log flats, equipped with steel log bunks constitute safe, adequate and sufficient equipment for the prompt, safe and expeditious transportation of logs, we strongly recommend that the carriers, parties hereto, equip a reasonable number of log flats with steel bunks, the number so equipped bearing a proper relation to the volume of log traffic on the respective systems. The testimony shows that cars so equipped will permit of heavier loading, and hence yield a greater revenue to the carriers. The minimum load for cars not equipped with steel bunks should be 500 feet less than the minimum prescribed for cars so equipped and we will so order. The Department will direct that a rule be carried in the tariffs of the carriers whereby a lower charge will be made on cars not equipped with steel log bunks.

XXIV.

The present method of specifying the minimum load per car is inequitable and results in the assessment of excess freight charges against the shipper who upon an average loads more than the minimum per car. A more equitable method would be to designate an average carload minimum based on the number of cars tendered the carrier in any one shipment, and the Department will so order.

XXV.

The promulgation of the rules designating an average carload minimum based upon the number of cars tendered the carrier in any one shipment will reduce the revenues of the carriers by an amount equal to the excess charges amounting to about six per cent of the total charges or approximately $150,000 per year, under the scale of rates herein prescribed. We have taken this into consideration and have fixed the basic rate sufficiently high to earn that additional revenue, that is to say, we have prescribed a rate that will produce six per cent more revenue than we would have prescribed had we not changed the rule as to minimum load.

XXVI.

The Department further finds that the practice of the carriers of assessing charges upon a log scale is not uniform and will expect the carriers to confer with the loggers for the purpose of determining the proper method of scaling logs and prescribe uniform rules in relation thereto. If agreement cannot be reached the Department will take the necessary steps to establish a fair and uniform rule.

XXVII.

The testimony disclosed that the carriers, parties hereto, had heretofore entered into certain contracts naming log rates, and we will direct that the carriers, parties hereto, terminate any and all such contracts insofar as they may name rates, rules, regulations or charges, differing from those herein prescribed.

ORDER.

Wherefore It Is Ordered by the Department of Public Works of Washington that North Pacific Coast Freight Bureau local freight tariff No. 29, W. D. P. W. No. 65, now under suspension, be, and the same is hereby cancelled.

It Is Further Ordered, that the following named carriers, to-wit: Northern Pacific Railway Company, Great Northern Railway Company; Chicago, Milwaukee & St. Paul Railway Company, and the Oregon-Washington Railroad & Navigation Company, parties hereto, and the said S. J. Henry, Agent, North Pacific Coast Freight Bureau, make, publish and file with this Department, effective on or before twenty (20) days from the date of service of this order, the following distance scale of rates for the intrastate transportation of soft wood logs to-wit: cedar, cottonwood, fir, hemlock, larch, pine, poplar and spruce logs in carloads within the State of Washington in lieu of all distance and commodity rates for the intrastate transportation of such logs in carloads within the State of Washington, the same to remain in effect during an experimental period of twelve months from the effective date thereof, or until the further order of this Department, and make, publish and file all tariffs, cancellations and changes necessary to conform to this order within the time aforesaid.

SCALE OF RATES.

Distances	*Rates in Cents per 1,000 Feet*
5 miles or less	115
Over 5, not over 10 miles	125
Over 10, not over 15 miles	135
Over 15, not over 20 miles	145
Over 20, not over 25 miles	155
Over 25, not over 30 miles	165
Over 30, not over 35 miles	175
Over 35, not over 40 miles	185
Over 40, not over 45 miles	195
Over 45, not over 50 miles	205
Over 50, not over 55 miles	215
Over 55, not over 60 miles	225
Over 60, not over 65 miles	235
Over 65, not over 70 miles	245
Over 70, not over 75 miles	255
Over 75, not over 80 miles	265
Over 80, not over 85 miles	275
Over 85, not over 90 miles	285
Over 90, not over 95 miles	295
Over 95, not over 100 miles	305
Over 100, not over 105 miles	315
Over 105, not over 110 miles	320
Over 110, not over 115 miles	330
Over 115, not over 120 miles	340
Over 120, not over 125 miles	350
Over 125, not over 130 miles	360
Over 130, not over 135 miles	370
Over 135, not over 140 miles	380
Over 140, not over 145 miles	390
Over 145, not over 150 miles	395

It is further ordered that the carriers, parties hereto, shall carry a rule in their tariffs applicable to the intrastate movement of logs in carloads within the State of Washington reading substantially as follows:

"Where cars not equipped with steel log bunks are furnished shippers, the charge applicable to each carload will be upon the basis of the rates named in this tariff, less a deduction of fifty (50c) cents per car."

IT IS FURTHER ORDERED that the carriers provide in their tariffs a minimum load of seven thousand (7,000 ft.) feet per each car equipped with steel log bunks and sixty-five hundred (6,500 ft.) feet per each car not so equipped, to be applied in all cases of single car shipments, but where more than one car is tendered or forwarded in any one shipment, that the minimum load of seven thousand (7,000 ft.) feet be averaged for the entire number of cars equipped with steel log bunks in any one shipment, and a minimum of sixty-five hundred (6,500 ft.) feet shall be averaged for the entire number of cars not so

equipped in any one shipment. This rule to apply in all cases except where existing tariffs provide a minima of less than seven thousand (7,000 ft.) feet because of peculiar type of car furnished, in which cases the existing minima shall be maintained. If any controversy arises in relation to the minima to be applied under this exception, the Department will take the necessary steps to determine the same.

IT IS FURTHER ORDERED that the carriers, parties hereto, terminate any and all contracts naming log rates insofar as they may differ from the rates, rules, regulations or charges prescribed herein.

WITNESS the Department of Public Works of Washington, this 1st day of February, 1922.

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON.

By E. V. KUYKENDALL,
Director.

HANCE H. CLELAND,
Supervisor of Public Utilities.

FRANK R. SPINNING,
Supervisor of Transportation.

Attest:
J. H. BROWN,
Secretary.

APPENDIX 2.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1923.

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, NORTH PACIFIC COAST FREIGHT BUREAU, and S. J. HENRY, as Agent of said North Pacific Coast Freight Bureau,
Plaintiffs in Error,

v.

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, E. V. KUYKENDALL, Director of Public Works, HANCE H. CLELAND, Supervisor of Public Utilities, and FRANK R. SPINNING, Supervisor of Transportation, Members of said Department of Public Works,
Defendants in Error.

No.....

Assignments of Error.

Come now the plaintiffs in error, Northern Pacific Railway Company, a corporation, Great Northern Railway Company, a corporation, Chicago, Milwaukee & St. Paul Railway Company, a corporation, Oregon-Washington Railroad & Navigation Company, a corporation, North Pacific Coast Freight Bureau, and S. J. Henry, as Agent of said North Pacific Coast Freight Bureau, and in connection with their petition for a writ of error in this cause assign the following errors which plaintiffs in error aver occurred on the trial thereof and upon which they rely to reverse the judgment entered here as appears of record.

I.

The Supreme Court of Washington erred in holding and deciding that the burden of proof was on plaintiffs in error to show that the rates and charges applicable to the transportation of logs were not unjust, unreasonable and unjustly discriminatory, and in affirming the order of the Department of Public Works so placing the burden of proof upon the plaintiffs in error, and thereby the property of plaintiffs

in error and each of them was taken without due process of law, and they are and each of them is deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

The Supreme Court of the State of Washington erred in refusing to reverse and set aside the order of the Department of Public Works of said state, for the reason that said order placed upon the plaintiffs in error the burden of proof to show that the rates and charges applicable to the transportation of logs were not unjust, unreasonable and unjustly discriminatory, thereby causing an undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other hand, and undue, unreasonable and unjust discrimination against interstate commerce, contrary to the commerce clause of the Constitution of the United States and contrary to Section 13 of the Interstate Commerce Act as amended by the Transportation Act of 1920.

III.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works, for the reason that in and by said order the Department cancelled the schedule of advanced rates applicable to the transportation of logs prescribed by the Interstate Commerce Commission in its decision in Ex Parte 74, 58 I. C. C., page 220, and thereby caused an unjust and unlawful discrimination against interstate commerce and a corresponding preference and advantage to intrastate commerce, in violation of the commerce clause of the Constitution of the United States and of Section 13 of the amended act to regulate interstate commerce, and deprives plaintiffs in error and each of them of a fair return on the value of their property awarded by the Interstate Commerce Commission pursuant to the provisions of section 15-A of said amended act to regulate commerce.

IV.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works prescribing a schedule of rates for the transportation of logs in the State of Washington, for the reason that said Department of Public Works incorrectly and inadequately determined the cost of said transportation by using a fundamentally erroneous theory in such determination, and thereby plaintiffs in error and each of them were deprived of just compensation for the transportation service rendered, and the property of each of them was taken without due process of law, and they and each of them were denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

V.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works prescribing a schedule of rates for the transportation of logs in said state, for the reason that said Department of Public Works incorrectly and inadequately determined the value of the property of plaintiffs in error and each of them, devoted to said transportation, by adopting and using a fundamentally erroneous theory for the determination of such valuation, and thereby deprived the plaintiffs in error and each of them of their property without due process of law, and denied them the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

VI.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works, for the reason that said order inadequately apportioned *ad valorem* taxes to the property devoted to the transportation of logs and refused to allow anything for Federal income taxes, and thereby deprived plaintiffs in error and each of them of a just return on the value of their property, contrary to the Fourteenth Amendment to the Constitution of the United States.

VII.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works of said state prescribing a schedule of rates for the transportation of logs in the State of Washington, for the reasons:

(*a*) That the said Department of Public Works in fixing said rates failed and refused to consider the values of the properties of the several plaintiffs in error employed in said transportation.

(*b*) That said Department of Public Works in fixing said rates failed and refused to consider the several costs to such plaintiffs in error of such transportation.

(*c*) That said Department of Public Works ordered each and all of the plaintiffs in error to adopt and observe a schedule of log rates in the State of Washington which is concededly not based upon the separate valuation or cost of operation of any of the corporate plaintiffs in error, but upon the assumed aggregate valuation and the assumed average cost of operation of all the corporate plaintiffs in error.

Thereby each of said plaintiffs in error is deprived of its property without due process of law and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VIII.

The Supreme Court of the State of Washington erred in refusing to reverse and set aside the order of the Department of Public Works

fixing said schedule of log rates in the State of Washington, for the reason that said Department of Public Works ignored the evidence as to the value of the property and cost of operation of each of plaintiffs in error at the places and upon the lines where the log service is performed by it, but based its order establishing said schedule of rates upon findings as to the assumed average cost of operation upon the combined systems of said corporate plaintiffs in error and as to the assumed combined valuation of the property of the corporate plaintiffs in error in the entire State of Washington.

IX.

The Supreme Court of Washington erred in affirming the order of the Department of Public Works, for the reason that the said order prescribes a schedule of log rates which does not pay the cost of the traffic to which it applies plus a fair return on the value of the property devoted thereto, and thereby the property of plaintiffs in error and each of them is taken without due process of law and they are deprived of the equal protection of the law.

X.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works, for the reason that the said order is based upon findings of fact which are not supported by any evidence and which are contrary to the undisputed evidence contained in the record of this case.

XI.

The Supreme Court erred in affirming the order of the Department of Public Works which cancelled Tariff No. 29 prescribing a schedule of advanced log rates no higher than plaintiffs in error and each of them are entitled to for the transportation of logs, and thereby plaintiffs in error and each of them are deprived of their property without due process of law and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

XII.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works of the State of Washington in establishing a rate for the transportation of logs in said state, for the reason that said rate was established as an experimental rate only for the purpose of determining whether such rate would or would not be sufficient, and thereby the corporate plaintiffs in error and each of them were denied the equal protection of the law and deprived of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

XIII.

The Supreme Court of the State of Washington erred in affirming the order of the Department of Public Works as it peculiarly affects plaintiff in error, Oregon-Washington Railroad & Navigation Company, for the reason that the Department refused to consider or allow anything for the amortization of the investment of said company in what is known as its North River Branch in this state, and thereby said company was deprived of its property without due process of law and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

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(PRAYER FOR REVERSAL OMITTED.)